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No. 90-1032

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

UNITED STATES OF AMERICA,

Petitioner,

versus

CHARLES E. ROEMER, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTION PRESENTED

Did Congress intend the word "representatives" as used in the Voting Rights Act of 1965, § 2(b) as amended, 42 U.S.C. § 1973, to include judges who are selected by a state judicial electoral process?

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STATEMENT

Since substantially all of the arguments as made by the United States of America in its Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been heretofore addressed by respondents in their *Brief of Respondents in Opposition* as filed in the companion case to this case, *Ronald Chisom, et al. v. Buddy Roemer, et al.*, 917 F.2d 187 (5th Cir. 1990), petition for cert. filed, 59 U.S.L.W. 3374 (U.S. Nov. 13, 1990), (No. 90-757, October Term, 1990), rather than restate their argument here, respondents adopt and reiterate their arguments as made in their response in *Chisom* (90-757). These same arguments were advanced in the case entitled *Clark, et al. v. Roemer, et al.*, petition for cert. filed, 59 U.S.L.W. 5433, (U.S. December 7, 1990) (No. 90-898, October Term, 1990), along with an additional argument as set forth in a section entitled:

> I. G. The "Dichotomy" between Sections 2 and 5 of the Voting Rights Act

ARGUMENT

Petitioner has suggested that:

> [T]he Fifth Circuit's decisions in this case and *LULAC* create an anomaly in the application of Sections 2 and 5 of the Voting Rights Act.

Petition at page 12. This assertion follows petitioner's earlier statement

> [I]n addition the Attorney General is responsible under Section 5 for reviewing voting changes, and must withhold preclearance if he concludes such action "is necessary to prevent a clear violation of amended section 2." 28 C.F.R.

> 51.55(b)(2). A decision that Section 2's dilution standard does not apply to judicial elections thus affects the manner in which the government review proposed voting changes in judicial election procedures under Section 5.

Petition at pages 9-10.

In addition to respondents' adoption of their arguments as made in *Chisom* (90-757) and *Clark* (90-898), respondents herein add a section to be entitled:

> [III]. The Experience Of The Courts With Section 5 Would Not Be Relevant In Determining Interpretation Of Section 2.[2]

The petitioner notes that in *Martin v. Haith*, 477 U.S. 901, 106 S.Ct. 3268, 91 L.Ed.2d 559 (1986) and in *Brooks v. Georgia State Bd. of Elections*, ___ U.S. ___, 111 S.Ct. 13, 112 L.Ed.2d 243 (1990), this Court summarily affirmed a district court decision that Section 5 of the Voting Rights Act applies to the state judiciaries. That section, however, does not use the crucial limiting term "representatives," a term with a plain meaning long construed by this Court. Indeed, this Court has recognized a distinction between the judiciary and other branches of the government in summarily affirming a decision that the "one man, one vote" principle does not apply to the judiciary. *Holshouser v. Scott*, 409 U.S. 807, 93 S.Ct. 43, 34 L.Ed.2d 68 (1972). The district court decision in *Holshouser* noted the difference between election of the judiciary and "election of the representatives of the people – officials who make laws, levy and collect taxes, and generally manage and govern people." *Holshouser v. Scott*, 335 F.Supp. 928, 930

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[2] For Sections I and II please see the Response in *Chisom*, 90-757.

(M.D.N.C. 1971). Judges, on the other hand, "do not govern nor represent people nor espouse the cause of a particular constituency." *Id.* at 932; *accord, New York State Association of Trial Lawyers v. Rockefeller,* 267 F.Supp. 148 (S.D.N.Y. 1967); *Buchanan v. Rhodes,* 249 F.Supp. 860 (N.D. Ohio), *appeal dismissed,* 385 U.S. 3, 87 S.Ct. 33, 17 L.Ed.2d 3 (1966).

In reality, neither the summary affirmance in *Martin, Brooks* nor in *Holshouser* govern the issue presented in this case. Even if either constituted an instructive precedent, such a summary affirmance is "not of the same precedential value as would be an opinion of the court treating the question on the merits." *Edelman v. Jordan,* 415 U.S. 651, 671, 94 S.Ct. 1347, 39 L.Ed.2d 662, 677 (1974); *accord, Tully v. Griffin,* 429 U.S. 68, 74, 97 S.Ct. 219, 50 L.Ed 2d 227, 233 (1976); *Richardson v. Ramirez,* 418 U.S. 24, 83 n.27, 94 S.Ct. 2655, 41 L.Ed.2d 551, 587 n.27 (1974) (Marshall, Douglas, & Brennan, J., dissenting).

Section 2 of the Voting Rights Act, as amended, created a "results" test while the unamended Section 5 of the Voting Rights Act has always applied an "effects" test. The two sections serve entirely different purposes. Section 5 has a limited applicability – only to specific targeted states where voting statutory changes may not occur without Justice Department approval [preclearance]. Section 2, however, applies to the voting statutes of all states as written and applied before and after the 1982 amendment. A Section 2 violation must be established through a full judicial evidentiary hearing, in which the plaintiff carries the burden of proof. A Section 5 determination is made initially administratively, mostly through correspondence. If the Section 5 change is found objectionable, then the finding is subject to judicial

review in the United States District Court for the District of Columbia, with the state bearing the burden of proof.

In commenting on the comparison of the "results" test [Section 2] with the "effects" test [Section 5], the Senate Report on the Voting Rights Act, S. Rep. No. 1992, 97th Cong. 2d Sess. (1982) stated:

> The confusion introduced by the results test is illustrated somewhat by the near-total disagreement as far as one of the most basic questions involved in the analysis: does the "results" test proposed in section 2 mean the same things as the "effects" test in section 5? Despite the fundamental importance of this matter, there has been disagreement among witness after witness on this.

Id. at 31.

> During the course of both the House and Senate hearings on the Voting Rights Act, approximately half of the witnesses who discussed this issue claimed that the results test in section 2 was similar or identical to the effects test in section 5, and hence that the judicial history of interpretation under section 5 was relevant; the other half argued that it meant something substantially or totally dissimilar.

Id. at 32.

Interestingly, Julius L. Chambers, one of the counsel for the petitioners in *Chisom* [90-757], testified concerning the difference between Section 2 and Section 5:

> Question: What is the relationship between the results test in section 2 and the effects test in section 5?
>
> Chambers: They are not the same test . . .

> Question: In other words, the experience of the courts with section 5 would not be relevant in determining how section 2 is likely to be interpreted?
>
> Chambers: That is correct.

Id. at 31-32.

Similarly, Professor Archibald Cox observed:

> If you mean the effects test as interpreted by the courts with regard to section 5, I think that is considerably different from the results test in section 2.

Id. at 32.

Forewarned by these differing opinions from congressional witnesses as to the applicability of the Section 2 "results" test, the Fifth Circuit turned to the plain meaning of the word "representatives" as used in the statute. *Latin American Citizens Council #4434 v. Clements*, 914 F.2d 620, 628-629 (5th Cir. 1990) (*en banc*). Section 5 does not use the term "representatives." Indeed, the term "representatives" appears nowhere in the Voting Rights Act except in Section 2(b). If Congress had intended "representatives" to mean "elected officials" (which would have included judges) it could easily have said so. Using the term "representatives" demonstrates Congress meant something other than all elected officials. "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning. [citations omitted]" *Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199, 204 (1979). As this Court has counseled, "we are not at liberty to construe language so plain as to need no construction, [fn. citations omitted] or

to refer to committee reports where there can be no doubt of the meaning of the words used [fn. citations omitted]. *Helvering v. City Bank Farmers Trust Co.*, 296 U.S. 85, 89, 56 S.Ct. 80, 80 L.Ed. 62, 66 (1935).

CONCLUSION

For the reasons set forth herein, and those as set forth in the *Chisom* Brief of Respondents in Opposition, [90-757], this Court should deny the Petition for Certiorari.

All of the above and foregoing is thus respectfully submitted.

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